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No. 01-1303

Supreme Court, U.S.
FILED
APR 4 2002

IN THE

Supreme Court of the United States

DARWIN GREEN, *et al.*,
Petitioners,

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENT NORTH ARUNDEL HOSPITAL ASSOCIATION, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Maryland Court of Appeals held that:

> In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding.

Pet. App. 29a-30a. The question presented is whether this holding violated Petitioner's rights under the Due Process or Equal Protection Clauses of the United States Constitution or gives rise to a remedy under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, the North Arundel Hospital Association, Inc. states that it is a non-stock, not-for-profit corporation whose sole member is the North Arundel Health System, Inc., also a non-stock, not-for-profit corporation. The sole member of North Arundel Health System, Inc., in turn, is the University of Maryland Medical System, Inc., also a non-stock, not-for-profit corporation.

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U.S. Const. amend. XIV ..... *passim*

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RESPONDENT NORTH ARUNDEL HOSPITAL ASSOCIATION, INC.'S BRIEF IN OPPOSITION

Respondent North Arundel Hospital Association, Inc., ("the Hospital") respectfully requests that this Court deny the petition for writ of certiorari. The opinion of the Court of Appeals of Maryland is reported at 366 Md. 597, 785 A.2d 361 (2001) and is reprinted in the Petition's Appendix at pages 1a-67a. The opinion of the Maryland intermediate appellate court is reported at 126 Md. App. 394, 730 A.2d 221 (1999) and reprinted in the Appendix at pages 68a-101a.

COUNTERSTATEMENT

The facts relating to Darwin Green's medical history are accurately set forth in the Court of Appeals' opinion at pages

3a-4a of the Appendix. The procedural history pertinent to the disposition of this Petition is as follows:

1. Just prior to trial, the Hospital moved to exclude Darwin Green from being present during the liability phase of his medical malpractice trial. The motion was premised on the facts that Darwin was and is in a vegetative state, unable to communicate, unable to participate or assist in any way with the presentation of his case, and unable even to understand what would be transpiring in court. Moreover, because his disabilities require constant nursing care and conspicuous medical equipment,[1] Darwin's presence in the courtroom would inevitably and understandably create a distraction for the jury. Based on these considerations, the Hospital argued that Darwin's presence at trial could serve no purpose other than to prejudice the jury against the defendants. Pet. App. 155a-159a.

2. In response to the motion, Petitioner's counsel urged the trial court to watch a "day in the life" video of Darwin so as to observe his condition and capabilities. The trial judge did so. Pet. App. 172a. The court also considered other evidence pertinent to the issue, including deposition transcripts and medical records. *Id.* After reviewing these materials, the trial court made these findings:

> Let me address that video which goes on at length showing the Plaintiff virtually motionless except for some eye blinking and except for periods of time when instruments were inserted by way of the feeding tube and the suctioning from the neck or throat area which the court understands by the records is done periodically, perhaps as often as every two hours. At that point, there is some jerking movement that lifts his

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[1] "Darwin was bound to a wheelchair, required twenty-four hour medical attention from nurses, breathed through a hole in his neck, and had to be fed via a feeding tube approximately every two hours." Pet. App. 71a.

legs and the extension of his arms above and about the bed he lies in.

. . . .[T]he Court feels confident to do some fact finding. And those facts are that and this particular Plaintiff does not have the ability to communicate in any fashion with counsel or his parents or the nurses in this video. And the Court is convinced that he will not be able to aid his counsel in prosecuting the case and offering any sort of input beyond that.

. . . . The Court finds then that he is reduced to the vegetable state. That there can be no purpose in presenting the Plaintiff short of prejudice to the Defendants' case.

. . . . In this instance, there can be no input to the Plaintiff's counsel. The Court cannot arbitrarily deny a party's right to be present during trial because of the party's appearance, but the possibility of prejudice is to be weighed.

And in this instance, the Court finds that it is great beyond the extension of any instructions that could be offered and will be offered in all likelihood in any case as to sympathy or prejudice public opinion. In this instance, the Court finds that . . . to grant a fair trial which would go to all parties would require excluding the Plaintiff. . . .

Pet. App. 94a-96a (trial court's findings as quoted in part by Court of Special Appeals). *See also* Pet. App. 172a-175a (trial court's findings in full).

3. At the *in limine* motions hearing, counsel for Petitioner made it clear that counsel did *not* seek to have Darwin Green present throughout the entire trial. Pet. App. 14a, 164a. On the contrary, as confirmed in Petitioner's brief in the court below, counsel "only sought his presence in the courtroom for a period of time less than an hour, on one day of trial. . . ." Pet. App. 14a-15a. This acknowledgment reveals the

ultimate cynicism of the Petition: Although counsel now seeks to champion the constitutional rights of disabled persons to attend and fully participate in all phases of civil trials, counsel's actions in the trial court in this case belie that stated intention.[2] Far from wanting to secure Darwin Green's right to be present throughout his trial, his lawyer merely wanted the opportunity briefly to present him to the jury for the obvious purpose of stirring their sympathies. As the Court of Appeals astutely (if bluntly) observed, these actions by Petitioner's counsel demonstrate rather clearly that the true purpose of seeking his attendance was to present him "as an exhibit, not to implement his Constitutional, statutory, or common law right to be present." Pet. App. 15a, n. 4.

4. At the conclusion of the *in limine* hearing, the trial court granted the Hospital's motion to exclude Darwin Green from the liability phase of his trial.[3] It explained:

> The burden of persuasion is on the moving party and they have carried that burden in this instance. The Defendant who seeks to exclude a handicapped plaintiff must establish that the presence of the plaintiff would prevent and substantially impair the jury's performance. The impairment or the prejudice must be so great that the jury instructions will not likely correct that prejudice.

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[2] Petitioner's counsel argued in the trial court that Darwin's presence was necessary as an element of Petitioner's *proof*. *See* Pet. App. 167a ("The reason for having the Plaintiff here, Your Honor, is the element of proof of the foreseeability of the damages for someone in Darwin's situation . . . ."). The point of having Darwin in court, according to his lawyer, was so that the jury could see "what his condition is and that that is something that is foreseeable." Pet. App. 164a. Petitioner's counsel repeatedly emphasized below that, for these "evidentiary" purposes, Darwin's presence *throughout* trial was not necessary. Pet. App. 164a ("And as we've indicated, he is not going to be sitting here the entire time for trial.")

[3] One or both of Darwin's parents were in attendance throughout the trial, along with his counsel. *See* Pet. App. 168a.

> And having viewed the tape, the Court is convinced that any viewing of the Plaintiff in person or by video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the Plaintiff. This trial is also a matter which is bifurcated. We addressed the matter of liability. And so, therefore, the Court sees no necessity as it would if and when we are at the state of the position of the trial addressing damages to have the Plaintiff present.
>
> Obviously, if the case were not bifurcated, or at least, I think, the Court would have a different slant on the particular circumstances which at some point it will certainly be necessary going beyond liability to address damages and then, of course, to have the Plaintiff presented if th[ose] are the wishes of the prosecutors of the claim.

Pet. App. 175a. As both appellate courts below noted, the trial court's findings "show that Judge Rushworth went to great lengths to ensure that Darwin's constitutional rights were not violated by arbitrarily excluding him from trial." Pet. App. 96a. *See also* Pet. App. 16a. These express findings also demonstrate the factual inaccuracy upon which the question presented by this Petition is premised: although Petitioner claims that "the trial judge made no finding . . . of actual prejudice to the defendants" (Pet. i), the transcript of the *in limine* hearing proves otherwise. Pet. App. 172a-175a.

5. Ultimately, the trial court's exclusion of Darwin Green, although plainly correct, was of no legal import one way or the other so far as the Hospital's alleged liability was concerned. This is because, at the close of Petitioner's case, the trial judge granted a directed verdict in favor of the Hospital as a matter of law on the grounds that (1) Darwin Green had failed to adduce any evidence of direct negligence on the part of the Hospital and (2) there was insufficient evidence to support an inference of vicarious liability against the Hospital under any "apparent agency" standard. Pet. App.

2a, 71a.[4] Petitioner never challenged the propriety of this directed verdict ruling. Pet. App. 98a. As the Court of Special Appeals held, because the Hospital was determined not to be liable as a matter of law, "[w]hether Darwin had been in the courtroom during the entire trial up to the point where the motions were granted could not possibly have helped appellants prove their case against [the Hospital] or Dr. Mody." *Id.*

6. Nor did the trial court's exclusion of Darwin Green ultimately affect the liability determination as to the remaining defendants. Although the case went to the jury as to Respondents Axelbaum and Fields, the jury returned a special verdict in favor of both of them, specifically finding that they had not deviated from the appropriate standard of care in treating Darwin Green. Pet. App. 98a. As the intermediate appellate court correctly noted, even "[i]f Darwin had been present during every minute of the trial, his presence could not have affected the answer to that standard of care question." *Id.*

REASONS TO DENY THE WRIT

The Court of Appeals' decision was both narrow in scope and in keeping with well-settled constitutional norms. It held that:

> In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the

[4] The trial court also directed a verdict in favor of one of the individual defendants, Dr. Harshad R. Mody.

> jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding.

Pet. App. 29a-30a. The Court of Appeals concluded that to exclude a plaintiff from the courtroom in this precise context was neither an abuse of discretion nor a violation of plaintiff's constitutional, statutory, or common law rights because "[w]hen all of those circumstances exist, as they did here, the plaintiff's presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard." *Id.* 30a.

Contrary to the Petition, this decision is plainly correct and raises no conflict as to any question of federal law. Although Petitioner suggests that the decision below is at odds with the holdings of several state courts of last resort, in fact *none* of the cases holds that a plaintiff has an absolute federal constitutional right to be present at a civil trial. Indeed, we are aware of no case, state or federal, to so hold. Rather, as we detail below, the cases relied upon by Petitioner either have no bearing on the issue presented here or rest entirely on state law grounds. There is no "disarray" among the lower courts as to the applicable federal constitutional law standards in this setting, and the Maryland Court of Appeals' carefully tailored decision is well within the mainstream of the case law in this area.

Finally, there is no colorable issue presented by the Petition under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. The courts below correctly concluded that, even were the ADA to apply here, its remedial scheme is expressly limited to various forms of compensatory damages or injunctive relief against whatever persons may be adjudged to have violated the statute. Nowhere in the statute, its regulations, or the case law "is there stated, or even

suggested, that, where the complaint concerns the exclusion of a disabled person from the courtroom by judicial ruling, reversal of the judgment entered in the case is a permissible remedy." Pet. App. 19a. Nor does the Petition cite any authority for this remarkable proposition.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS AS TO ANY FEDERAL QUESTION.

A. In the decision below, the Maryland Court of Appeals acknowledged, "[i]n concert with courts throughout the country," that "a party to civil litigation has a right to be present for and to participate in the trial of his/her case." Pet. App. 20a. The Court of Appeals explained that the source of that right "emanates, at least, from the common law of Maryland, from the due process clause of the Fourteenth Amendment to the U.S. Constitution, from the Maryland equivalent of that clause, Article 24 of the Declaration of Rights, and from Article 19 of the Declaration of Rights." *Id.* However, the court below also "made clear, as have most other courts in the nation, that the right is not absolute—that there are circumstances in which a civil case may proceed without the attendance of a party and, indeed, with the party excluded." *Id.*

In framing the issue, the court below carefully reviewed and considered federal and state case law from across the country discussing the scope of the right to be present at trial and defining the very narrow set of circumstances in which it may be appropriate for a trial court to exclude or limit a party's presence in the courtroom. Pet. App. 21a-29a. Finding the Sixth Circuit's analysis in *Helminski v. Ayerst Lab.*, 766 F.2d 208 (6th Cir. 1985) to be particularly helpful, the Court of Appeals here recognized that " 'a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent

disruptive behavior or a knowing and voluntary waiver,' and that includes a plaintiff with a 'solely physical abnormality . . . even when the abnormality is due allegedly to the defendant's wrongful conduct.' " Pet. App. 26a (quoting *Helminski*). And, like the Sixth Circuit in *Helminski*, the Court of Appeals below acknowledged that "although the mere sight of a severely injured plaintiff may evoke jury sympathy, 'juror sympathy alone is insufficient to establish juror prejudice' for, generally, a jury will follow the court's instructions and decide the case solely on the facts." *Id.*

However, the Maryland Court of Appeals also agreed with the Sixth Circuit (and the many other courts to have faced the issue) that there may be a narrow range of circumstances where exclusion is necessary to ensure a fair trial. Again, quoting from *Helminski*, the court below explained:

> . . . there may be occasions when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability. Should such a case arise and the presence of the party would not aid the fair administration of justice, the trial court can exclude the plaintiff or limit his presence. A party's involuntary exclusion under these circumstances would not constitute a denial of due process.

Pet. App. 26a. Such a narrow exception, the court noted, has been widely recognized. *See* Pet. App. 23a-28a (citing *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526 (1964); *Morley v. Superior Court of Arizona*, 131 Ariz. 85, 638 P.2d 1331 (1981); *In re Richardson-Merrell, Inc.*, 624 F. Supp. 1212 (S.D. Ohio 1985); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987); *Bremner v. Charles*, 312 Or. 274, 821 P.2d 1080 (1991); *Burks v. Harris*, 1992 WL 322375, 1992 Tenn. App. LEXIS 913 (Tenn. App. 1992); *Province v. Center for Women's Health & Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr.2d 667 (1993); *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D.2d 507, 611 N.Y.S.2d 655 (A.D.

1994); *Reems v. St. Joseph's Hosp.*, 536 N.W.2d 666 (N.D. 1995); *Wozniak v. New Britain General Hosp.*, 2001 WL 717497, 2001 Conn. Super. LEXIS 1547 (2001)).

Based on this analysis, the Court of Appeals concluded that the trial court in this case had not abused its discretion in excluding Darwin Green from the liability phase of his civil trial. The Court was quite careful to say, however, that its "holding is a narrow one"—namely: "In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding." Pet. App. 29a-30a. The Court of Appeals noted the existence of some "decisions holding that the exclusion of a party from a civil trial was error," but it explained, correctly, that none of them involved a party who was "(1) wholly unable to communicate or assist in the presentation of the case, (2) incapable of comprehending the proceeding, and (3) excluded only from the liability phase of a bifurcated trial, where his/her presence would likely be both prejudicial to the defendant and irrelevant, in an evidentiary sense, to any issue then before the jury." Pet. App. 28a.

B. The Petition's primary argument in favor of review is that there is a purported conflict created by the decision below as to "a matter of United States constitutional law" regarding the rights of a disabled litigant to be present at his or her civil trial. Pet. 13. Petitioner claims that "[s]everal states have ruled that a plaintiff has *an absolute right* to be

present at his or her civil trial" (*id.* 15 (emphasis added))—identifying cases from Connecticut, Illinois, Michigan, New Jersey, New York and North Carolina—and that the decision below is at odds with these cases.

Petitioner is incorrect. Exactly *none* of the cases cited in the Petition holds that a plaintiff has, as a matter of federal constitutional law, an absolute right to be present at a civil trial. Petitioner creates the appearance of a conflict only by mischaracterizing (or ignoring) the actual holdings of these cases and taking quotations from them out of context. Moreover, nearly all of these decisions rest on considerations of state, not federal, law. We address them in the order cited by Petitioner:

1. Connecticut—*Rozbicki v. Huybrechts*, 218 Conn. 386, 589 A.2d 363 (1991), cited in the Petition at page 15, presented no issue of federal law. The sole question decided in that case was the right of a party under Connecticut law to be present during pre-trial voir dire proceedings. 589 A.2d at 363 ("This appeal concerns the state constitutional right of a party to a civil action to be present during the voir dire of potential jurors.") Moreover, the court's holding was limited to voir dire rights. Subsequent Connecticut case law notes that "*Rozbicki* does *not* state that a party has an absolute right to attend trial. . . ." *Wozniak v. New Britain General Hospital*, 2001 WL 717497 at *2, 2001 Conn. Super. LEXIS 1547 at *6 (June 1, 2001) (emphasis added).

2. Illinois—*Odum v. Corn Products Refining Co.*, 173 Ill. App. 348, 1912 Ill. App. LEXIS 421 (1912), also cited at page 15 of the Petition, was an intermediate Illinois appellate court decision that likewise presented no federal question of any sort. Moreover, it did not even involve the rights of a *party* to attend trial. *Odum* was a wrongful death action by the administrator of an estate against the deceased's former employer where the employer sought to exclude the deceased's widow and children from the courtroom for fear

that their presence would arouse juror sympathies. The trial court ruled, uncontroversially enough, that there was no basis in Illinois state law for excluding persons with an interest in the outcome of a case from watching the trial; a ruling the appellate court had no trouble affirming. There is nothing in *Odum* of any relevance to the question presented by the Petition. It decided no issue of federal law, no issue regarding the rights of the disabled, and no issue relating to the rights of a party to attend his civil trial.

3. Michigan—*McIntosh v. McIntosh*, 79 Mich. 198, 44 N.W. 592 (1890), cited at page 16 of the Petition, also presented no federal issue. It addressed the reach of Michigan's common-law "rule of exclusion" relating to witnesses (a state law analog to what is now Fed. R. Evid. 615)—*i.e.*, whether the trial court had the discretion under state procedure (as it existed in 1890) to exclude the defendant father from the courtroom during his son's testimony. The court resolved the question as a matter of state procedural law without addressing any constitutional question, state or federal.[5] It is wholly inapposite.

4. New Jersey—*Leonard's of Plainfield, Inc. v. Dybas*, 130 N.J.L. 135, 31 A.2d 496 (1943), cited at page 16 of the Petition, involved a case where the trial judge gave the jury supplemental instructions outside of the courtroom and outside of the presence of either the defendant or his attorney. The New Jersey Supreme Court held, unremarkably, that "if supplementary instructions are deemed necessary" in a case, "they shall be given only in open court in the presence of the

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[5] *Florence v. Wm. Moors Concrete Products, Inc.*, 35 Mich. App. 613, 193 N.W.2d 72 (1971), cited at footnote 5 of the Petition, is an intermediate appellate court decision from Michigan which likewise rested entirely on state law. It held merely that the trial court in that case erred under Michigan law by excluding the plaintiffs from the courtroom when the court re-read the charge to the jury.

parties and their counsel. . . ." 31 A.2d at 497. *Leonard's* has nothing to do with the issues presented here.

5. New York—*Carlisle v. County of Nassau*, 64 A.D.2d 15, 408 N.Y.S.2d 114 (1978), cited at page 16 of the Petition, was an intermediate New York appellate case holding that it was error for the trial judge to exclude the plaintiff from voir dire merely because he was wheelchair-bound. However, as that same New York appellate department explained later in *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D.2d 507, 611 N.Y.S.2d 655 (1994), *Carlisle* did *not* hold that a disabled person's right to be present at trial is absolute. On the contrary, and consistent with the Maryland Court of Appeals' holding here, the *Caputo* court explained:

> Although the physical condition of a plaintiff, in and of itself, is not enough to justify his involuntary exclusion from any phase of the trial (*see Carlisle v. County of Nassau*, 64 A.D.2d 15, 408 N.Y.S.2d 114), *when a plaintiff is both physically and mentally incapable and his mental capacity prevents him from assisting counsel in any meaningful way, then the decision to exclude the plaintiff from the liability phase of a trial lies within the sound discretion of the trial court. . . .*

611 N.Y.S.2d at 656 (emphasis added).

6. North Carolina—*Raper v. Berrier*, 246 N.C. 193, 97 S.E.2d 782 (1957), also cited at page 16 of the Petition, was a child custody dispute where the trial judge conducted an ex parte interview of the minor child over the objection of the father. The North Carolina Supreme Court held, as a matter of North Carolina law, that such interviews in child custody proceedings should take place in open court with all parties present. That case, too, rested on state law and has nothing to do with the issues raised by the Petition.

* * * *

In sum, Petitioner's contention that the decision below "conflicts" with other cases is demonstrably incorrect. None of the cases cited in the Petition recognize an absolute federal constitutional right of a party to be present at all phases of a civil trial. There is no conflict warranting this Court's review.

II. THE DECISION BELOW IS CONSISTENT WITH SETTLED CONSTITUTIONAL PRINCIPLES.

A. As demonstrated above, the Maryland Court of Appeals' decision is in accord with settled case law around the country in holding that there may be exceptional circumstances—like those presented here—that justify a trial court in excluding a severely disabled plaintiff from the liability phase of his or her civil trial. To our knowledge, neither this Court nor any other federal or state court has ever held to the contrary—*i.e.,* that the due process or equal protection clauses of the federal constitution guarantee a litigant the *absolute* right to be present at all phases of trial.

Despite this absence of authority, Point II of the Petition argues that, as a matter of constitutional policy, excluding a severely disabled litigant even in the extremely prejudicial circumstances of this case necessarily compromises "the basic fairness of the trial. . . ." Pet. 24. There is no merit to this argument. As the appellate court below noted, the trial judge went to great lengths to ensure the overall fairness of the proceedings. Pet. App. 96a. Moreover, though Darwin was excluded from the liability phase of the trial, his parents were not. They were present, along with his counsel. Indeed, prior to excluding Darwin, the trial judge obtained a commitment from Petitioner's counsel that one or both of Darwin's parents would attend the trial. Pet. App. 168a. For these reasons, the Petition's claim that the trial judge conducted a "trial *in absentia*" that "is abhorrent to all modern-day notions of justice" (Pet. 24) is sheer hyperbole.

Equally unavailing is the claim that Petitioner had a constitutional right to "confront" witnesses testifying against him "face to face." Pet. 23-24. To our knowledge, no court has ever held that a plaintiff in a civil case has any such constitutional right. Indeed, trial courts in civil cases routinely permit testimony to be given by witnesses other than in the face-to-face context of open court—for example, testimony by transcribed or videotaped deposition is plainly allowed when a witness is outside the subpoena power of a court or otherwise unavailable. In any event, our civil justice system has a panoply of safeguards in place designed to instill a respect for truth-telling by witnesses, including the right of cross-examination, penalties of perjury for false testimony, the contempt powers of the court, and the ultimate confidence our system places in the jury to distinguish honest answers from prevarication.

The only genuine issue of "fairness" presented by cases such as this one is the concern—directly and correctly addressed by the lower courts here—that juries decide such cases based on the evidence and not on natural feelings of human sympathy for severely disabled persons. In cases where the disabled plaintiff can participate in the proceedings, assist counsel, or otherwise comprehend and make decisions concerning the trial, the right of such a plaintiff to be present at his or her trial generally needs to be respected and the trial court should typically address issues of potential prejudice through means other than exclusion, such as by giving the jury cautionary instructions. However, in those exceptional cases, such as this one, where the plaintiff cannot exercise his right to be present in any meaningful way, trial judges should be given the discretion to determine whether the risks of prejudice are best addressed through exclusion. Certainly, nothing in the Constitution forbids the exercise of such discretion on the facts presented here.

Finally, the Petition's suggestion that the appellate courts below engaged in standardless review of the Circuit Court's exclusionary ruling (*see* Pet. 25), or that the trial court failed to "undertake specific fact-finding" (*id.*), is contrary to the record. The lower courts carefully articulated and applied the constitutional standards and analysis developed in the case law (*see* Pet. App. 20a-30a, 90a-99a), and the trial judge conducted a thorough evidentiary hearing and supported his conclusions with specific findings of fact. *See id.* 172a-175a. There was no error, much less one of constitutional dimensions.

B. This case does not, in any event, provide the Court with a suitable context in which to review the constitutional question posed by the Petition, even if that question were otherwise worthy of this Court's review. This is so for two reasons:

1. As noted by the Court of Appeals in footnote 4 of its opinion (Pet. App. 15a), there is a substantial issue as to whether Petitioner waived the argument that he had a constitutional right to be present *throughout* his trial. Indeed, the sudden enthusiasm counsel for Petitioner now expresses for the rights of the disabled to be present throughout *all* phases of civil trials is directly undermined by her stated willingness in the courts below to drastically limit Darwin's attendance at trial—*i.e.*, to offer to have him present "for a period of time less than an hour, on one day of the trial. . . ." Pet. App. 15a. If Darwin's asserted constitutional right to be present throughout trial is as fundamental to his due process and equal protection interests as the Petition now claims, and is equally necessary to the administration of a fair trial, one wonders why counsel was so willing to compromise those rights just to get Darwin in front of a jury for an hour? To state the question is to answer it. *See* Pet. App. 15a n. 4 ("If, as we are now told, the intent was to have him brought in on one day for less than an hour, the implication is even stronger

that his presence would simply be as an exhibit, not to implement his Constitutional, statutory, or common law right to be present.") This also renders particularly disingenuous Petitioner's counsel's attempt to chastise the Court of Appeals for reducing Darwin "to an object, to be exhibited to the jury" (Pet. 28), since it was *counsel* who initially sought to justify Darwin's presence in these evidentiary terms. *See* Pet. App. 167a. In any case, these issues of waiver would, at a minimum, complicate this Court's review of the question presented and render this case less than ideal for the exercise of certiorari jurisdiction.

2. There is also some doubt as to whether the correctness of the trial court's exclusionary ruling regarding Darwin's presence at trial was necessary to support the judgment below. As the intermediate appellate court held, because the Circuit Court directed verdicts in favor of the Hospital and Dr. Mody *as a matter of law*—rulings that were never appealed by Petitioner—Darwin's attendance in the courtroom could have had no affect on these strictly legal determinations: "Whether Darwin had been in the courtroom during the entire trial up to the point where the motions were granted could not possibly have helped appellants prove their case against [the Hospital] or Dr. Mody." Pet. App. 98a.

Similarly, the trial court's exclusion of Darwin Green did not ultimately affect the liability determination as to the remaining defendants. Although the case went to the jury as to Respondents Axelbaum and Fields, the jury returned a special verdict in favor of both of them, specifically finding that they had not deviated from the appropriate standard of care in treating Darwin Green. Pet. App. 98a. As the intermediate appellate court correctly noted, even "[i]f Darwin had been present during every minute of the trial, his presence could not have affected the answer to that standard of care question." *Id.*

The Court of Appeals, for whatever reason, never passed on these alternative holdings of the intermediate appellate court. However, we submit that they were correct and that resolution of the "right to attend" issue was not—and is not—strictly necessary to the proper disposition of this case. This consideration likewise counsels against certiorari review by this Court.

III. THERE IS NO ISSUE UNDER THE ADA PRESENTED BY THE PETITION THAT IS WORTHY OF THIS COURT'S REVIEW.

The ADA provides for specific remedies—ranging from compensatory damages to injunctive relief, depending upon the circumstances—where a plaintiff establishes the requisite statutory elements of discrimination in employment or public accommodations. However, as the Court of Appeals correctly held, nowhere in the ADA or its regulations "is there stated, or even suggested, that, where the complaint concerns the exclusion of a disabled person from the courtroom by judicial ruling, reversal of the judgment entered in the case is a permissible remedy." Pet. App. 19a. Nor does the Petition cite a single case in support of such an expansive reading of the ADA's remedial provisions.

Thus, even assuming that the trial court's exclusion of Darwin Green could somehow be construed as a substantive violation of the statute—and Petitioner has cited no case in support of that proposition either—the ADA's remedial scheme cannot fairly be interpreted to authorize, much less require, setting aside a judgment in a civil case between private parties. In this regard, we can do no better than to repeat the Court of Appeals' holding on this point: "There is no provision in either Federal or State law, to the best of our knowledge—and none has been cited to us—authorizing the reversal of a judgment in a civil case or the awarding of a new trial as a remedy" in these circumstances. Pet. App. 18a.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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